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No. 00-353

OCT 05 2000

IN THE

Supreme Court of the United States

OMNIPOINT COMMUNICATIONS ENTERPRISES, L.P.,
Petitioner,

v.

NEWTOWN TOWNSHIP
AND
THE ZONING HEARING BOARD OF NEWTOWN TOWNSHIP,
Respondents.

On Petition for Writ Of Certiorari to the United States Court of Appeals for the Third Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF SPRINT SPECTRUM, L.P. IN SUPPORT OF PETITIONER

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October 5, 2000

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

Sprint Spectrum, L.P. ("Sprint PCS") hereby respectfully moves, pursuant to Rule 37.2 of the Rules of this Court, for leave to file the attached brief as *amicus curiae*. Although Petitioner has consented to the filing of this brief, Respondents have not consented.

Sprint PCS provides high quality wireless telephony through a nationwide network utilizing state-of-the-art CDMA all-digital technology. To provide its customers with a seamless national network, Sprint PCS needs to build out a network of wireless infrastructure. The Telecommunications Act of 1996 ("the Act") limits the ability of local authorities to block construction of this infrastructure. Sprint PCS has been involved in substantial litigation concerning the

meaning of the Act and has an interest in ensuring that the federal courts correctly interpret the Act.

Sprint PCS believes that the attached brief will assist the Court in its consideration of this case. Although Sprint PCS shares an interest in a correct interpretation of the Act with other wireless providers, Sprint PCS has a unique perspective on this case. As the court below indicated, Sprint PCS's existing facilities enable it to serve its customers in the locality directly affected by the decision below. *See* Pet. App. at 10a. Accordingly, the decision below gives Sprint PCS an advantage in serving that locality. However, the attached brief explains how the need for seamless national wireless coverage makes such localized advantages illusory.

In addition, the decision below appears to rest on mistaken assumptions about wireless technology. In particular, the decision below appears to assume that wireless technology is fungible so that if a consumer using one technology can place a call, all wireless consumers can place a call. Sprint PCS is in a position to correct these mistaken assumptions.

For the foregoing reasons, Sprint PCS respectfully seeks leave to file the attached brief.

Respectfully submitted,

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INTEREST OF AMICUS CURIAE

Sprint Spectrum, L.P. ("Sprint PCS") provides high quality wireless telephony through a nationwide network utilizing state-of-the-art CDMA all-digital technology. To provide its customers with a seamless national network, Sprint PCS needs to build out a network of wireless infrastructure. The Telecommunications Act of 1996 ("the Act") limits the ability of local authorities to block construction of this infrastructure. Accordingly, Sprint PCS has an interest in ensuring that the federal courts correctly interpret the Act.

Although Sprint PCS shares this interest in a correct interpretation of the Act with other wireless providers, Sprint PCS has a unique perspective on this case. As the court below indicated, Sprint PCS has the capacity to serve its customers in the Newtown Township area through its existing facilities. *See* Pet. App. at 10a. Accordingly, the decision below gives Sprint PCS an advantage in Newtown. However, the market for wireless services is national, not local. As a result, Sprint PCS's interest in ensuring a correct interpretation of the Act nationwide transcends any benefit it might receive in Newtown. For this reason, Sprint PCS files this brief urging the Court to grant certiorari.[1]

SUMMARY OF ARGUMENT

The decision below conflicts with the law of other circuits and the letter and spirit of the Telecommunications Act of 1996. By granting preferential status to wireless carriers with existing facilities in specific localities, the decision below prevents new wireless carriers from building effective and competitive national wireless networks.

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[1] Petitioner has consented to the filing of this brief, but Respondents have not. No counsel for a party authored this brief in whole or in part, and no person or entity, other than *amicus curiae* and its counsel, made a monetary contribution to the preparation and submission of this brief.

The decision below conflicts with the law of other circuits not just in general approach, but on three distinct issues that are critical to the operation of the cellular siting provisions of § 704 of the Act. First, the circuits are split as to whether individual siting decisions, as opposed to general municipal policies, can "prohibit or have the effect of prohibiting the provision of personal wireless services." 47 U.S.C. § 332(c)(7)(B)(i)(II) ("the anti-prohibition provision"). Second, the circuits differ over the amount of discretion that local zoning officials retain under the Act. Third, the circuits are split as to whether the presence of a competitor providing service from existing facilities in a locality precludes a new entrant from demonstrating that a zoning decision has "the effect of prohibiting the provision" of wireless services. *Id.* By granting certiorari, this Court could resolve all three splits and establish a uniform national rule for a wireless industry that is nationwide in scope.

The decision below also conflicts with the text and purposes of the Act. The Act aims to promote competition and spur the deployment of new technologies (which, in turn, facilitate enhanced competition). However, by granting preferential status to existing wireless providers, the decision below protects a patchwork of local wireless monopolies using established technologies. The decision also permits local zoning officials to limit competition and decide how many competitors may serve a local community. The Third Circuit's approach cannot be squared with the text of the Act, which proscribes discrimination among carriers and local zoning decisions that "prohibit or have the effect of prohibiting the provision of personal wireless services." *Id.*

Finally, the circuit splits posed in Omnipoint's Petition merit expeditious consideration by this Court. Tolerance of divergent views among the circuits will frustrate the Act's objectives. The Third Circuit's decision stands as an obstacle to the development of seamless and competitive nationwide

wireless networks. Wireless providers cannot offer truly nationwide service if they cannot offer seamless service in Pennsylvania, New Jersey, and Delaware. This Court should grant certiorari to resolve the differing interpretations of § 704.

ARGUMENT

I. THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF OTHER CIRCUITS IN BOTH BROAD TERMS AND ON THREE SPECIFIC ISSUES

As Omnipoint demonstrates in its Petition (Pet. at 7-11), the circuits have taken a number of different approaches in interpreting the siting provisions in § 704 of the Act. However, a focus on the general approaches of the various circuits obscures the conflicting conclusions they have reached on a number of important and distinct issues raised by the siting provisions. Indeed, the circuits are split on three main issues, and Omnipoint's Petition provides a vehicle to resolve all three.

First, the circuits have split over whether an individual adverse siting determination can violate the statutory prohibition on zoning regulations that "prohibit or have the effect of prohibiting the provision of personal wireless services." 47 U.S.C. § 332(c)(7)(B)(i)(II). The Fourth Circuit initially took the position that a single adverse decision could not have the effect of prohibiting the provision of personal wireless services. *See AT&T Wireless PCS, Inc. v. City Council of the City of Virginia Beach*, 155 F.3d 423, 428-29 (4th Cir. 1998) (Luttig, J.). The Fourth Circuit held that the anti-prohibition protection of 47 U.S.C. § 332(c)(7)(B)(i)(II) "only applies to 'blanket prohibitions' and 'general bans or policies,' not to individual zoning decisions." *Id.* at 428 (quoting the district court opinion).

The First Circuit took a different view in *Town of Amherst v. Omnipoint Commun. Enters., Inc.*, 173 F.3d 9, 14 (1st Cir. 1999). In *Amherst*, the First Circuit recognized that an individual adverse zoning decision could reflect a broader policy prohibiting the siting of wireless infrastructure. *See id.* Although the First Circuit acknowledged the Fourth Circuit's contrary approach in *Virginia Beach*, it dismissed the difference as "more one of language than substance." *Id.* Presumably, this comment reflects the fact that although the First Circuit will examine an individual adverse determination for evidence of a general policy, it still requires a general policy of prohibition. The Fourth Circuit appeared to take a similar view in *360° Commun. Co. v. Board of Supervisors of Albemarle Cty.*, 211 F.3d 79, 86 (4th Cir. 2000). The court reaffirmed that "case-by-case denials of permits for particular sites cannot, without more, be construed as a denial of wireless service." *Id.* (citing *Virginia Beach*). Nonetheless, the court left open the possibility that an individual denial could evidence a general policy of prohibition. *See id.* at 86-87.

Whatever the exact degree of conflict between the First and Fourth Circuits, the Second Circuit clearly takes a different view. The Second Circuit rejected the Fourth Circuit's position as "untenable," in part because it "would essentially convert subsection B(i)(II) into a simple directive to consider applications on a case-by-case basis." *Sprint Spectrum, L.P. v. Willoth*, 176 F.3d 630, 640 (2d Cir. 1999). The Second Circuit also noted that: "Construing subsection B(i)(II) to apply only to general bans would lead to the conclusion that, in the absence of an explicit anti-tower policy, a court would have to wait for a series of denied applications before it could step in and force a local government to end its illegal boycott of personal wireless services." *Id.* at 640-41. Finally, the Second Circuit concluded that "[a]lthough attractively simple, such an interpretation is contrary to the TCA's intent to 'encourage the rapid deployment of new telecommunications

technologies.'" *Id.* at 641 (quoting *Reno v. American Civil Liberties Union*, 521 U.S. 844, 857-58 (1997)).

The Third Circuit appears to follow the Second Circuit on this issue and has observed that "local officials must always ensure that neither their general policies nor their individual decisions prohibit or have the effect of prohibiting personal wireless services." *Cellular Tel. Co. v. Zoning Bd. of Adjustment of the Borough of Ho-Ho-Kus*, 197 F.3d 64, 70 (3d Cir. 1999). Indeed, in the decision below, the Third Circuit took the extreme position that even a blanket prohibition on new cell sites would not violate the Act, as long as established providers are offering wireless service through existing facilities. *See* Pet. App. at 10a n.15. In other words, local officials do not violate the Act when they impose a blanket ban on new services and protect existing providers. Accordingly, while the Fourth Circuit analyzes general bans to the exclusion of individual zoning decisions, the Third Circuit appears to analyze individual decisions to the exclusion of general bans.

Second, the circuits differ on the broader question of the extent to which the Act restricts the authority of local zoning officials. The siting provisions of the Act represent a "refreshing experiment in federalism." *Amherst*, 173 F.3d at 17. The Act expresses the strong federal interest in deploying wireless technology, while respecting the traditional role local authorities have played in zoning decisions. Rather than having the strong federal interest simply override the local role, as initially proposed, Congress allowed municipalities to retain local authority over zoning decisions provided those decisions comply with federal law, including the requirement that local regulations not have the effect of prohibiting personal wireless services. The circuits differ over what authority the Act preserves for local zoning officials.

The Fourth Circuit treats the authority of local zoning authorities as largely unchanged by the Act. In *Virginia*

Beach, for example, the Fourth Circuit limited the application of § 704's anti-prohibition provision to general policies and blanket bans because the contrary view "would effectively nullify local authority." 155 F.3d at 428; *see also id.* at 429 (noting that the Fourth Circuit rule "is necessary to avoid destroying local authority"). A subsequent panel of the Fourth Circuit went even further and suggested that a strict interpretation of § 704's requirement that local zoning authorities make their decisions in writing based on substantial evidence, 47 U.S.C. § 332(c)(7)(B)(iii), "might well even invite Tenth Amendment scrutiny." *AT&T Wireless PCS, Inc. v. Winston-Salem Zoning Bd. of Adjustment*, 172 F.3d 307, 313 (4th Cir. 1999). Indeed, Judge Niemeyer, writing only for himself, found that provision incompatible with the Tenth Amendment. *See Petersburg Cellular Partnership v. Board of Supervisors of Nottoway Cty.*, 205 F.3d 688, 705 (4th Cir. 2000).

The Second Circuit (and to a lesser extent the Third Circuit), by contrast, emphasize the strong federal interest in deploying wireless technology. *See, e.g.*, *Willoth*, 176 F.3d at 644 ("The TCA imposes limits on the authority of state and local governments to restrict personal wireless services."). As a result, while acknowledging that the Act preserves a role for local authorities, these courts have construed that role as much more limited. Although local zoning boards retain the authority to direct cellular companies to a feasible site that minimizes interference with local interests, "local governments must allow service providers to fill gaps in the ability of wireless telephones to have access to land-lines." *Id.* at 643; *accord APT Pittsburgh L.P. v. Penn Township*, 196 F.3d 469, 479 (3d Cir. 1999). In other words, local zoning officials lack authority to deny access to a necessary site, and retain authority only to direct a provider to a specific sufficient site, if more than one site suffices.

In a recent decision, the Fourth Circuit expressly and categorically rejected this analysis. *See 360° Commun.*, 211 F.3d at 87. The Fourth Circuit dismissed this view as inconsistent with the Act and as erroneously "shifting the burden of production to the local government to explain its reason for denying such an application." *Id.*

The split of authority on this question reflects broad disagreement over the extent to which the Act limits local zoning authority. Continued disharmony and uncertainty about the authority of local officials will result in significant federal-court litigation to review the actions of local zoning authorities. This litigation creates unnecessary friction and threatens to undermine the Act's "refreshing experiment in federalism." This Court should grant certiorari to eliminate this friction and fix the meaning of the Act.

Third, and finally, there is a split of authority between the Second and Third Circuits over whether § 704's anti-prohibition provision applies when another service provider already offers service in the area. In *APT*, the Third Circuit adopted a novel and mischievous rule that effectively reads § 704's anti-prohibition provision out of the statute whenever another carrier already provides service in an area. *See* 196 F.3d at 480. Specifically, *APT* held that "[t]he provider's showing on this issue will thus have to include evidence that the area that the new facility will serve is not already served by another provider." *Id.* Such a test clearly undermines competition. The decision below quoted this language and remanded the case solely for application of this new test. *See* Pet. App. at 9a; *see also* Pet. App. at 10a ("The question then remains as to whether other providers already serve the area at issue in this case.").

Although the Third Circuit purported to build its analysis on that of the Second Circuit in *Willoth*, the Third Circuit in fact created a split over whether another provider's existing service in an area precludes a violation of § 704's anti-

prohibition provision. In *Willoth*, an analog cellular carrier, Frontier Corporation, already served the area that Sprint PCS sought to serve through the installation of new facilities. *See* 176 F.3d at 638-39 (discussing Frontier). Nonetheless, *Willoth* expressly rejected the municipality's argument that "its earlier approval of Frontier's application and professed willingness to accept some level of PCS service" defeated Sprint PCS's claim. *Id.* at 640. The Second Circuit also rejected as "untenable" the "result that once personal wireless services are available somewhere within the jurisdiction of a state or local government, whether by virtue of a facility located outside or inside its borders, the state or local government could deny any further actions with impunity." *Id.* at 641.[2]

This case provides an ideal vehicle for resolving all three of these circuit splits. This case allows this Court to determine the scope of § 704's anti-prohibition provision (whether it covers blanket policies, individual determinations, or both) and the extent of the authority retained by local zoning officials under the Act. This Court also can resolve the question whether the presence of an existing carrier in a locality precludes a violation of § 704's anti-prohibition provision. This case provides a vehicle to address all three questions and to give invaluable guidance for numerous wireless providers and countless municipalities across the country.

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[2] To be sure, the Second Circuit observed that "once an area is sufficiently serviced by a wireless service provider, the right to deny applications becomes broader." *Id.* at 643. However, in light of the observations quoted above and its treatment of Frontier, the Second Circuit's use of the phrase "sufficiently serviced" cannot be read to mean simply the presence of one pre-existing carrier. The Third Circuit's decisions in this case and *APT*, however, make just this error in interpreting *Willoth*.

II. THE DECISION BELOW UNDERMINES THE CORE PURPOSES OF THE ACT AND THE SPECIFIC PROVISIONS ADDRESSING LOCAL ZONING AUTHORITY

The decision below threatens to deny consumers the benefits of competition and innovative technology promised by the Telecommunications Act. The decision thwarts these goals by enabling local zoning boards to deny competitive entry by new wireless providers as long as some consumers already are able either to "connect with the land-based national telephone network, or to maintain a connection capable of supporting a reasonably uninterrupted network." Pet. App. at 10a (quoting *Ho-Ho-Kus*, 197 F.3d at 70). This result conflicts with the Act's overall purposes and the intent of the specific provisions addressing the siting of wireless facilities.

A. The Decision Below Contradicts the Act's Overriding Pro-Competitive Purpose.

The Third Circuit's decision stymies competition rather than encouraging it by creating a barrier to the entry of competitive wireless providers. The Act heralded a sea change in the structure of the telecommunications industry. With the passage of the Act, consumers no longer would remain beholden to local telephone monopolies. The Act replaced monopolies with competition that would lead to the introduction of innovative technology, which, in turn, would unleash further competition. As its preamble makes clear, the Act aims "[t]o promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies." Pub. L. No. 104-104, 110 Stat. 56, preamble (1996).

Moreover, as numerous courts have recognized, the Act's legislative history underscores these stated goals. Congress

designed the Act "to provide for a pro-competitive, de-regulatory national policy framework designed to accelerate rapidly private sector deployment of advanced . . . technologies and services . . . by opening all telecommunications markets to competition . . . ." H.R. Conf. Rep. No. 104-458, at 113 (1996), *reprinted in* 1996 U.S.C.C.A.N. 124, 124 (quoted with ellipses in *Willoth*, 176 F.3d at 637). Indeed, this Court recognized in *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 371 (1999), that Congress crafted the Act to replace "the longstanding regime of state-sanctioned monopolies" with a competitive market structure. "States [could] no longer enforce laws that impede competition . . . ." *Id.*

Congress viewed the Act as landmark legislation designed to revolutionize the telecommunications industry. "The [Act] is expansive legislation designed primarily to increase competition in the telecommunications industry." *BellSouth Mobility, Inc. v. Gwinnett Cty.*, 944 F. Supp. 923, 927 (N.D. Ga. 1996); *see also AT&T Commun. Sys. v. Pacific Bell*, 203 F.3d 1183, 1184 (9th Cir. 2000); *U.S. West Commun. v. MFS Intelenet, Inc.*, 193 F.3d 1112, 1116 (9th Cir. 1999). The Act "is critically important because it unleashes a digital free-for-all [which] takes down the barriers of local and long distance and cable company and satellite, computer, software entry into any business they want to get in. Once and for all, all regulations are taken down." Cong. Rec. H1151 (Feb. 1, 1996) (statement of Rep. Markey).

The President articulated a similar view of the importance of the Act in his signing statement. He observed that the telecommunications "revolution has been held back by outdated laws designed for a time when there was one phone company, three TV networks, no such thing as a personal computer. Today, with the stroke of a pen, our laws will catch up with our future. We will help to create an open marketplace where competition and innovation can move as

quick as light." The White House: Remarks by the President in Signing Ceremony for the Telecommunications Act Conference Report, FDCH Federal Department and Agency Documents (Feb. 8, 1996).

The decision below frustrates these congressional and presidential objectives and returns wireless markets back to "outdated laws, designed for a time when there was one phone company." The decision simultaneously undermines the Act's twin goals of promoting competition and innovation. The decision converts a pro-competitive law into an obstacle to competition. Under the Third Circuit's view, the Act limits local authority only when "the area the new facility will serve is not already served by another provider." Pet. App. at 9a (quoting *APT*, 196 F.3d at 480). In other words, local authorities may deny a new entrant's request to build a wireless facility whenever the new facility would provide competition, and the Act constrains local officials only when a carrier is seeking to become the first and only provider in a previously unserved area. This interpretation cannot be squared with the Act's pro-competitive orientation.

Indeed, the Third Circuit's one-carrier-serves-all rule squarely conflicts with the Act's overall approach to wireless service. Before the mid-1990's, the wireless market was essentially a regulated duopoly in which two carriers were assigned spectrum to provide cellular service to consumers in an area. Historically, one of the carriers was the incumbent local exchange provider (*e.g.*, the Bell Operating Companies) with AT&T/McCaw Cellular often providing the alternative. In light of their government-conferred duopoly, these wireless carriers operated under a number of constraints.

In 1995 and 1996, the FCC, the courts, and Congress began to remove these restrictions. In 1995, the FCC allocated additional spectrum for the provision of PCS telephone service. That same year, the court with jurisdiction over the AT&T consent decree waived the decree's long-distance

prohibition under certain conditions. *See United States v. Western Elec. Co.*, 890 F. Supp. 1, 7-9 (D.D.C. 1995). The Act removed most of the remaining constraints on wireless carriers. *See* 47 U.S.C. §§ 271(b)(3) (creating an exception to interLATA prohibitions); 332(c)(8) (removing general equal access obligations for all commercial mobile radio service providers); 332(c)(7)(B) (precluding state - and local governments from prohibiting the deployment of competitive wireless services).

At the same time that the courts and Congress were removing these constraints, Congress was opening up the wireless market to competition. During 1995 and 1996, the government auctioned bandwidth spectrum and wireless licenses, and private carriers built new wireless systems (PCS and SMR). These developments transformed a duopoly into a competitive market. Within two years, consumers began to enjoy the benefits of this increased competition: significant decreases in the price of wireless service, offers of minutes to be used for any type of call (*i.e.*, local or long distance), and wireless Internet access.

Sprint was one of these new entrants. Beginning in 1995, Sprint acquired new broadband PCS licenses (for which it paid the United States nearly $3 billion) to provide wireless services in all 50 states, the District of Columbia, Puerto Rico, and the U.S. Virgin Islands. Although it commenced service only three years ago, Sprint PCS already serves over eight million customers and its state-of-the-art, CDMA, all-digital network covers the majority of the nation's metropolitan areas, including more than 4,000 cities and communities across the country.

The decision below reintroduces the bad old days of the wireless duopoly, or perhaps worse. Under the Third Circuit's analysis, if one provider already serves a market through existing facilities, local authorities can block any new entry. Local authorities have *carte blanche* under the Third

Circuit's opinion to set whatever level of competition they see fit. In many communities, the decision below will have the effect of enshrining the old duopoly carriers, although those carriers will now operate without the regulatory constraints that previously limited their ability to exploit their market power. Moreover, in some communities, where only one carrier has established facilities, the Third Circuit's regime will preclude all competition and give a carrier with existing facilities an unregulated monopoly over wireless service.[3]

The Third Circuit's one-carrier-serves-all rule also reflects a fundamental misunderstanding of wireless technology. Consumers currently can choose from a number of competing technologies that are not interchangeable or compatible. For example, a consumer using Sprint PCS's CDMA digital technology cannot utilize analog infrastructure to place or receive calls, unless the consumer happens to have a dual-mode (analog/digital) telephone. Accordingly, the availability of analog service employing existing analog infrastructure in a locality makes no practical difference to a consumer with a single-mode CDMA telephone. Although the Third Circuit purported to consider the availability of service from the perspective of the end-user, *see* Pet. App. at 10a, its failure to understand wireless technology leaves many end-users without effective service.

The decision below not only fails to understand wireless technology, it also affirmatively undermines the Act's intent to "encourage the rapid deployment of new

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[3] The potential ability of other carriers to pay for access to the monopoly facilities does not eliminate this threat to competition. In some cases, the carrier with an effective local monopoly will employ outdated technology that will not allow other carriers' customers to complete a call. But even where technology does not present insuperable obstacles, access charges allow the local monopolist to extract monopoly rents from all customers in violation of the evident purpose of the Act.

telecommunications technologies." Pub. L. No. 104-104, 110 Stat. 56, preamble (1996). By eliminating the Act's protection in localities already served by another provider, the Third Circuit entrenches incumbent wireless carriers. In the rapidly developing wireless market, protecting the incumbent means favoring outmoded technologies, such as analog cellular. As technology continues to develop, the decision below will continue to disadvantage innovative technologies and artificially extend the life of outdated technologies that have little to offer besides existing tower space.[4]

B. The Decision Below Undermines the Specific Provisions Directed at Siting Issues and Local Zoning Authority.

Section 704 of the Act specifically addresses wireless siting issues and expresses the strong federal interest in ensuring the deployment of competitive wireless services. As the Second Circuit observed in *Willoth*, Congress enacted § 704 "[i]n furtherance of" the Act's overall goals of promoting competition and the rapid deployment of advanced technologies. 176 F.3d at 637; *see also Petersburg Cellular*, 205 F.3d at 697 (Niemeyer, J.) ("The Telecommunications Act of 1996 seeks to promote a more efficient wireless communications system for consumers, and to this end, it facilitates the construction of communications facilities.").

"Although the TCA 'does not completely preempt the authority of state and local governments to make decisions

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[4] It is no answer to suggest that local authorities will not allow inefficient monopolies because local residents would bear the brunt of inefficient service and monopoly prices. The whole theory underlying the Act's partial pre-emption of local zoning authority is that while local residents bear the full cost associated with any new facilities, they do not enjoy the full benefits of enhanced wireless services, which they share with cellular users who have no voice in local affairs. Section 704 corrects this imbalance, while the Third Circuit's decision exacerbates it.

regarding the placement of wireless communications service facilities within their borders,' it does impose significant limitations on this authority.'" *Sprint Spectrum L.P. v. Town of Easton*, 982 F. Supp. 47, 49 (D. Mass. 1997) (quoting *BellSouth Mobility*, 944 F. Supp. at 927). In particular, the Act forbids discrimination in the zoning process among wireless carriers, 47 U.S.C. § 332(c)(7)(B)(i)(I), requires local authorities to expedite wireless siting applications, 47 U.S.C. § 332(c)(7)(B)(ii), and requires local authorities to make their decisions in writing based on substantial evidence in the record, 47 U.S.C. § 332(c)(7)(B)(iii). In addition, and of particular relevance here, the Act commands that local siting decisions "shall not prohibit or have the effect of prohibiting the provision of personal wireless services." 47 U.S.C. § 332(c)(7)(B)(i)(II).

The Third Circuit's misguided view cannot be reconciled with these statutory provisions. By allowing municipalities to block the construction of any new facilities as long as some infrastructure exists, the Third Circuit effectively prohibits the provision of competitive personal wireless services, even though Congress already determined that competition should remain open. Moreover, by granting preferential status to a wireless carrier with existing installed facilities, the Third Circuit ironically authorizes the very discrimination among carriers that the immediately preceding subsection of the Act forbids. Finally, by granting blanket authority to block the construction of new infrastructure as long as existing facilities are in place, the Third Circuit undermines the Act's requirement that local authorities justify individual zoning decisions on a case-by-case basis, in writing, and based on record evidence.

The Third Circuit's one-carrier-serves-all regime also conflicts with Congress' intent in enacting § 704. That section "effects substantive changes to the local zoning process . . . by preempting any local regulations, including

zoning regulations, which conflict with its provisions." *SBA Commun., Inc. v. Zoning Comm'n of Town of Brookfield*, No. 3:00CV006-GLG, 2000 WL 1276834, at *3 (D. Conn. Sept. 6, 2000) (citing *Easton*, 982 F. Supp. at 50). Congress found that "[s]tate and local requirements, siting and zoning decisions" had "created an inconsistent and, at times, conflicting patchwork of requirements" that was "inhibit[ing] the deployment" of wireless communications services. H.R. Rep. No. 104-204, at 94 (1995), *reprinted in* 1996 U.S.C.C.A.N. 10, 61.

The Third Circuit ignores these strong federal interests and virtually guarantees a patchwork system of inefficient wireless service. The decision below gives local authorities a trump card that allows them to disregard all these federal interests as long as some carrier is providing service from existing facilities. Sprint PCS, like Omnipoint, AT&T, and others, depends on tower siting to build out its network so that consumers can enjoy Sprint PCS's state-of-the-art wireless services wherever they travel. If local authorities can bloek the construction of new infrastructure by pointing to a provider of antiquated analog cellular service, the Act will fail to achieve its two principal goals. In short, the decision below returns wireless service to the bad old days of duopoly and consigns consumers to yesterday's technology.

III. THE ISSUES RAISED BY THE DECISION BELOW MERIT THIS COURT'S IMMEDIATE ATTENTION

The circuit splits posed in Omnipoint's Petition, and developed *supra* at 3-8, merit expeditious consideration. Unlike some areas of the law where such splits can "percolate" for several years as the lower courts strive for consensus, the issues presented in this case require immediate resolution. Indeed, this Court twice has granted certiorari to review important issues under the Telecommunications Act

even in the absence of a circuit split. *See GTE Service Corp. v. FCC*, 120 S. Ct. 2214 (2000); *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 371 (1999).

The wireless industry has become a truly national industry. Consumers demand a service that allows them to place and receive calls when they get off an airplane or travel on an interstate highway. They do not want to have to carry a separate telephone employing outdated technology just so they can make calls in a locality that has blocked the deployment of sophisticated wireless technology.

To satisfy consumer demand, Sprint PCS and its competitors must develop seamless nationwide wireless networks. The Telecommunications Act recognizes the important federal interest in the establishment of these networks, and limits local authority to prevent this development. The Act cannot accomplish this goal if disparate interpretations of § 704 are allowed to stand. Nationwide networks cannot be built if the Third Circuit maintains an interpretation of the Act at variance with the text and the views of its sister circuits. National wireless carriers cannot offer seamless nationwide service if they cannot build adequate facilities in Pennsylvania, New Jersey, and Delaware.

The Act recognizes that the siting provisions demand expedition to function. Subsection B(v) allows carriers to challenge "any final action or failure to act" and requires the courts to "hear and decide such action[s] on an expedited basis." 47 U.S.C. § 332(c)(7)(B)(v). In addition, a number of courts have recognized the need for expedition in ensuring that local zoning officials do not use procedural obstacles to impose a de facto prohibition on the construction of wireless facilities. *See, e.g., Amherst*, 173 F.3d at 17 & n.8. This Court will further the Act's interest in expedition by definitively resolving the issues raised in Omnipoint's Petition.

Finally, it bears emphasis that by granting certiorari this Court can eliminate unnecessary friction between state and local governments and the federal courts. As noted, § 704 embodies a unique and "refreshing experiment in federalism." *Id.* at 17. Section 704 authorizes federal courts to review the decisions of local zoning boards as if they were decisions from federal agencies. Uncertainty exacerbates the inevitable friction between the federal courts and local authorities. This Court can minimize that friction by fixing the meaning of the Act. In sum, this Court should grant certiorari now to resolve the differing interpretations of the siting provisions, without waiting for further percolation in the lower courts.

CONCLUSION

For the foregoing reasons, and those expressed in Omnipoint's Petition, this Court should grant Omnipoint's Petition for certiorari.

Respectfully submitted,

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